Supreme Court, U.S.
FILED
FEB 12 1999
CLERK

No. 98-983

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CECILIA LACKS,
Petitioner,
v.
FERGUSON-FLORISSANT REORGANIZED SCHOOL DISTRICT, R-2,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR PETITIONER

JEREMIAH A. COLLINS *
LEON DAYAN
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

LISA S. VAN AMBURG
VAN AMBURG, CHACKES, CARLSON & SPRITZER
8420 Delmar Boulevard
St. Louis, Missouri 63124

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE FACTS	1
THE FIRST AMENDMENT NOTICE ISSUE	4
THE TITLE VII EMPLOYER-RESPONSIBILITY ISSUE	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Gebser v. Lago Vista Independent Sch. Dist., 118 S. Ct. 1989 (1998)	7
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995)	6
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	6, 7
McKinney v. Alabama, 424 U.S. 669 (1976)	6
Simpson v. Diversitech, 945 F.2d 156 (6th Cir. 1991)	7
Smith v. California, 361 U.S. 147 (1959)	6
Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993)	6
Wieman v. Updegraff, 344 U.S. 183 (1952)	6
Willis v. Marion County Auditors Office, 118 F.3d 542 (7th Cir. 1998)	10

REPLY BRIEF FOR PETITIONER

In an apparent effort to divert attention from the fact that the Court of Appeals squarely decided two pure questions of law of great importance to First Amendment and Title VII jurisprudence, the Respondent School District ("District") attempts to create the impression that review of the decision below would present routine disputes about questions of fact.

We begin this Reply by removing any doubt that the facts that frame the issues presented are as stated in the Petition. We then establish that nothing in the Brief in Opposition ("Opp.") succeeds in minimizing the worthiness of reviewing the Eighth Circuit's rulings on the important questions of law presented by this case.

THE FACTS

When the jury rendered its verdict in favor of Petitioner Cecilia Lacks, it gave affirmative answers to special interrogatories on both her First Amendment and Title VII claims. Consequently, as the Court of Appeals acknowledged, Lacks was entitled on appeal to have the evidence on both claims "viewed in the light most favorable to the jury's verdict." Pet. App. 13a. The District nevertheless includes in its Brief in Opposition a lengthy recitation of what it denominates "Respondent's Version" of the facts, Opp. at 3, which, far from presenting the evidence in the light most favorable to the verdict, indulges in misrepresentations of key testimony and cites extensively to extra-record material that was not before the jury.[1]

1. The District asserts that Lacks was not terminated simply for failing to discipline her students when they

[1] In particular, the District cites extensively to the transcript of the School Board hearing. *See* Opp. at 4 n.1; *id.* at 6, 7, 8, 9, 10. That transcript—reflecting a hearing that took place before Lacks had been allowed to engage in discovery—was not introduced into evidence at trial.

included profanity in their classroom writing, but for "authoriz[ing]," "approv[ing]" and "set[ting] a climate" for profanity—"if not promoting [such] conduct." Opp. at 5-7, 10. That is not the case. The School Board's written decision announcing the decision to terminate Lacks stated that "the singular charge being pursued was [her alleged] violation of board policy number 3043," Exh. 4, p. 2; and Policy 3043 is the directive that requires school employees to discipline students whose behavior violates the Student Discipline Code. *See* Exh. 96 at 55.

There was not the slightest evidence that Lacks ever affirmatively *encouraged* her students to include profanity in their writing—or even that she had suggested to them the themes, such as gang activity, that led the students, in the drama exercises at issue, to have their fictional characters make use of profanity. *See* Tr. 409-414 (Lacks' uncontroverted testimony describing the play-writing assignment and her instructions to the students). The District's assertion that Lacks "authorized," "approved" or "set a climate" for the use of profanity is based on nothing more than the notion that a teacher who does not take action against students who use profanity in their creative writing *ipso facto* "promotes" profanity. Opp. at 6-7. Whatever verbs the District may choose to employ, the fact remains that the only conduct with which Lacks was charged was that she did not take action against students whose creative works contained profanity.

2. The record, viewed as the jury was entitled to view it, does not support the District's declaration that the use of profanity by Lacks' students was "so pervasive, flagrant and reprehensible as to be beyond comparison to any other student-conducted presentations at the District." Opp. at 8. The jury viewed the tapes of the drama exercises written by Lacks' students, and was able to confirm for itself that, as an expert in student play-writing testified, "[t]he language was appropriate for the characters, and this is language that we have seen in classrooms across the country." Tr. 1181. Unlike the student of another teacher in the District who had received an "A" for writ-

ing a play with characters named "Freddy Fuck" and "Peter Prick," *see* Petition at 6, Lacks' students wrote their scripts with serious intent, Tr. 1180, using profanity not gratuitously or for salacious purposes but to convey a realistic depiction of themes selected by the students that were important to them. *See* Petition at 4.[2]

3. The District asserts that two witnesses called by Lacks condemned the profanity in the drama exercises written by Lacks' students. Opp. at 8-9. But the testimony of those witnesses that is relevant to the questions presented here is their confirmation that the Student Discipline Code was *not* considered to be applicable to students' classroom writing. *See* Petition at 7 (quoting testimony of Karen Price); Tr. 1083 (testimony of Kathryn Nelson that the District's policies prohibited profanity "as part of the behavior code," but "[n]ot in creative writing").

4. The District's misrepresentation of the record reaches its zenith in the following statement in the Brief in Opposition:

> Petitioner's reliance on Vernon Mitchell's statement regarding "black students acting a fool" in the videotapes is misplaced. Even assuming *arguendo* that Mr. Mitchell made this statement, it does not qualify as "direct evidence" of discrimination, as Mr. Mitchell is not a decision-maker and did not refer to *Petitioner's* race.

Opp. at 9-10 (footnote omitted; emphasis in original).

---

[2] So too, the jury could see that nothing in the tapes constitutes "simulated acts of sexual intercourse." Opp at 3. Indeed, as regards sexual content, the drama exercises composed by Lacks' students are mild in comparison to the 1992 student-written school-sponsored play, "How Ya Livin'," which was praised by Principal Vernon Mitchell. *See* Petition at 6. (The jury was shown a tape of that play.) The same point holds true with respect to the depictions of gang violence in "How Ya Livin'," which included the graphic desecration of a corpse. Exhs. 247, 248.

That assertion is untrue. As the Eighth Circuit noted, "Mitchell admitted that when he saw the videotape with the students performing their play, his reaction was that it was 'black students acting a fool *and white folks videotaping it.*'" Pet. App. 13a (emphasis added). Mitchell testified at trial that he made that statement in a meeting with one of Lacks' students, to explain to the student what he (Mitchell) saw as "offen[sive]" in Lacks' conduct. Tr. 1392-93, 1426. Mitchell hardly could deny having made the statement, as he had tape-recorded his meeting with the student, and the tape had been provided to Lacks' counsel. Tr. 1392. Contrary to the District's assertion, and its cropped quotation of Mitchell's statement, Mitchell's actual statement describing what "offended" him about Lacks' conduct most definitely *did* refer to Lacks' race.

THE FIRST AMENDMENT NOTICE ISSUE

Until this case, the Ferguson-Florissant Student Discipline Code never had been applied to students' use of profanity in creative writing, and neither teachers nor administrators had understood the Code to have any application in that context. *See* Petition at 5-8. The Eighth Circuit held that, "as a matter of law," such evidence could not sustain the jury's finding that Lacks had not received the reasonable notice that is required by the First Amendment before a teacher may be fired for her speech activities, because it is linguistically possible to construe the Student Discipline Code as applying to classroom writing. Pet. App. 11a. *See* Petition at 17-18.

Thus the Eighth Circuit adopted the position that citizens must "t[ake] the risk," Pet. App. 11a, that the government will extend a policy prohibiting speech to the furthest possible reach of the policy's literal terms, no matter how strong the evidence may be that that is not the true intent of the policy.

None of the District's efforts to defend the Court of Appeals' decision on this point provides any cogent reason why the decision does not warrant review by this Court.

1. Contrary to the District's suggestions, *see* Opp. at 13-14 and nn. 5, 6, a requirement of reasonable notice does not conflict with a school board's authority to make decisions regarding school policy and curriculum. The question presented here is not whether a school district may *adopt* a policy prohibiting profanity in students' classroom writing and requiring teachers to enforce the prohibition, but simply whether a district that chooses to adopt such a regime must give *reasonable notice* that it has done so.

2. Quixotically, the District argues that this case does not merit review because determining the adequacy of notice for First Amendment purposes is a "fact-specific" matter that must be assessed "case-by-case." Opp. at 18. Yet the error of the court below consisted of ignoring that very point: after hearing a great deal of testimony on how Policy 3043 had been understood and applied in practice during Lacks' 20-plus years as a teacher, the jury made a "fact-specific" determination that Lacks had not received reasonable notice; the Eighth Circuit overturned that finding because, on its view, reasonableness of notice is to be decided "as a matter of law" solely by parsing the text of the written policy invoked by the government.

3. Similarly off the mark is the District's contention that Lacks' position would require an undue level of specificity in school board policy documents. *See* Opp. at 14-19. Lack's case is *not* based on a mere lack of specificity in the text of the Student Discipline Code, but on a wealth of evidence as to how the Code *had in fact been understood and enforced*. *See* Petition at 5-10.

4. At bottom, the District's position is that Lacks had no First Amendment right to notice at all, because, in the District's eyes, notice is simply an issue of due process. *See* Opp. at 15, 19.[3] That contention is untenable. Where

[3] The District goes so far as to intimate that the notice question is not before the Court because Lacks did not appeal the District Court's pre-trial grant of summary judgment against her on a procedural due process claim. *Id.* As the District well knows, that

a teacher is threatened with termination because of speech activities, reasonable notice is required "[b]ecause *First Amendment freedoms* need breathing space to survive." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (emphasis added) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)). This is true even if the teacher has no property interest in continued employment, as was the case in *Keyishian* itself. *See* 385 U.S. at 592 (noting that Mr. Keyishian was an untenured "instructor in English" with a "one-year term contract"). *See also Ward v. Hickey*, 996 F.2d 448, 450, 454 (1st Cir. 1993) (a "non-tenured biology teacher" had "a First Amendment right . . . to know what conduct is proscribed").

Indeed, the court below accepted all of this. Pet. App. 10a (citing *Ward*).[4] Yet, by treating the reasonableness

---

claim concerned the adequacy of the *hearing procedures* provided to Lacks. It had nothing to do with the First Amendment notice issue. Indeed, the District agreed at trial that the question whether Lacks had received reasonable notice as required by the First Amendment was a matter that should be submitted to the jury, Tr. 2065, and the Eighth Circuit, of course, reached the merits of that issue.

[4] Nor did the court below adopt the suggestion now advanced by the District that Lacks was not entitled to any First Amendment protection because her own speech was not restrained and her students' plays constituted unprotected "obscene" speech. *See* Opp. at 13 n.4. The District's suggestion is without substance. This Court repeatedly has held that a person who facilitates the speech of others is protected by the First Amendment even if his or her own expression of ideas is not at stake. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995). A teacher's refraining from censoring student speech is a particularly compelling example of such protected activity. *See Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Furthermore, the District did not contend at trial, much less did the jury find, that the classroom writings of Lacks' students fit the constitutional definition of "obscenity;" nor, in any event, would such a finding have meant that the First Amendment afforded her no protection against being terminated without reasonable notice for not disciplining the students. *See Smith v. California*, 361 U.S. 147, 155 (1959); *McKinney v. Alabama*, 424 U.S. 669, 673-674 (1976).

of notice as a matter to be resolved merely by determining, in a linguistic vacuum, whether it is possible to construe a school board policy as reaching a teacher's speech, the Eighth Circuit has adopted a position in conflict with that of other circuits, *see* Petition at 18-22, and has endorsed an approach under which teachers who do not wish to "t[ake] the risk" of punishment, Pet. App. 11a, will necessarily "steer far wider of the unlawful zone," *Keyishian*, 385 U.S. at 604 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958), thus fostering the very kind of chilling effect that the First Amendment notice requirement is intended to prevent.

THE TITLE VII EMPLOYER-RESPONSIBILITY ISSUE

Echoing the Court of Appeals, the District argues that the jury verdict for Lacks on her race discrimination claim could not stand because the two administrators whom the jury could find to have acted out of racial animus—Principal Mitchell and Assistant Superintendent Wright—"did not participate in the Board's deliberations regarding the termination of Petitioner's employment." Opp. at 21. *See also id.* at 6 (emphasizing that "race was never considered, or even mentioned, as part of the Board's deliberations").

The proposition that a school district should not be held liable for a supervisor's racial discrimination against an employee unless the deliberations of the district's governing body are themselves directly predicated on race would have some force if this case arose under § 1983, § 1981, or Title IX, *see* Petition at 23-24; and at least one judge has suggested that such a limitation should apply under Title VII as well. *See Simpson v. Diversitech*, 945 F.2d 156, 162-63 (6th Cir. 1991) (Kennedy, J., dissenting). But, until the decision in this case, no court of appeals had adopted that position with respect to Title VII, which, unlike those other statutes, "explicitly defines 'employer' to include 'any agent'." *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1996 (1998).

The court below did not deny that the jury properly could have found that Mitchell and Wright, who unquestionably are agents of the District, discriminated against Lacks because of her race. *See* Pet. App. 13a. Furthermore, the jury explicitly found that "plaintiff's race was a motivating factor in her termination," and that the District had not "proven by the preponderance of the evidence that [it] would have discharged Lacks regardless of her race." The jury properly could have based those findings as to causation on two grounds, neither of which the Eighth Circuit declared to be factually unsupported.

First, considering Mitchell's approval of the production by an African-American teacher of the play "How Ya Livin'," *see supra* note 2, and Mitchell's admission that what offended him about the drama exercises of Lacks' students was that "white folks videotap[ed] it," *see supra* at 4—together with other evidence of racial animus and of the District's past tolerance of profanity in creative writing, *see* Petition at 5-11—the jury could find that the charges against Lacks *never would have come before the Board* but for the racially motivated actions of Mitchell and Wright in causing the charges to be filed and pursued.[5]

Second, as the Eighth Circuit acknowledged, in the administrative hearing "[t]he school board . . . heard testimony from . . . Mitchell that he told Lacks that profanity was not permitted in the school newspaper," and "[w]hen the board issued its opinion terminating Lacks' contract, it based its decision in part on its finding that Lacks had

---

[5] The charges were drafted by Wright (for the signature of Superintendent Fritz), on the heels of an investigation triggered and conducted by Wright and Mitchell—the very investigation in which Mitchell explained to a student that what was offensive was that "white folks" had taped the drama exercises of "black students." In the meeting of the Superintendent's cabinet in which the results of the investigation were discussed and the decision was made to file charges, Mitchell recommended that Lacks be terminated. Hrg. Tr. 801 (excerpt read into the record at trial, *see* Dist. Ct. Dkt. No. 130).

been warned about the use of profanity by Mitchell." Pet. App. 7a-8a. It therefore is simply false for the District to declare that "the Board did not rely on, defer to, or in any other way base its decision to terminate Petitioner's employment on anything submitted by either of the allegedly biased administrators." Opp. at 25.

Mitchell's testimony about those alleged warnings was crucial to the Board's decision to terminate Lacks. Under Missouri law, the Board could vote to terminate only if it found that Lacks had *willfully* violated Board policy. As the court below observed, this required the Board to find "an intent to violate or disobey a particular regulation," meaning that the Board had to find "that Lacks . . . knew that the board policy applied to the profanity used by her students." Pet. App. at 6a. Mitchell's testimony was the *only* evidence cited in the Board decision that purported to establish such "willfulness" on Lacks' part. *See* Exh. 4 (Board Decision) at 4.

The Court of Appeals recognized that the jury could find that Mitchell lied when he claimed to have warned Lacks about profanity in the newspaper. *See* Pet. App. 11a.[6] And the jury could find as well that Mitchell's racial animus against Lacks was what caused him to provide the Board with a false basis for terminating her.

Both of the means by which Mitchell and Wright acted to harm Lacks—by causing charges to be pursued, and by Mitchell's false testimony upon which the Board relied—have been held by other circuits to constitute grounds upon which an employer can be held liable under Title VII despite an absence of discriminatory intent on the part of the employer's ultimate decisionmakers. *See* cases cited in the Petition at 28-29.[7] The Eighth Circuit's decision

---

[6] In fact, it was established at trial that Mitchell's testimony to the Board about the alleged warnings was entirely false. *See* Petition at 12 and n.11.

[7] There is no basis for the District's contention that the Eighth Circuit's decision could be sustained on the theory that "[the] causal link between the alleged bias of Petitioner's supervisors

rejecting liability creates a circuit conflict on a question of exceptional importance to the administration of Title VII. *See* Petition at 25-30. The need for guidance from this Court is particularly acute because none of the numerous court of appeals decisions on this subject has articulated a cogent rationale for determining when the innocence of an employer's top decisionmakers should absolve the employer of liability under Title VII for an adverse employment action engineered by biased subordinate officials. *See* Petition at 25-28.[8] Clarification urgently is needed of the principles that should govern the myriad of Title VII cases in which an employment action is the joint product of biased subordinates and innocent superiors.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the Court should grant the Petition for Certiorari.

---

and the Board's ultimate decision is broken by the Board's independent action." Opp. at 22. As we have shown, the board's "ultimate decision" placed crucal reliance on Mitchell's false and racially motivated testimony. And, if Mitchell and Wright had not caused charges to be filed in the first place, there never would have been any "ultimate decision" of the Board to terminate Lacks.

[8] An apt illustration is the Seventh Circuit's recent decision in *Willis v. Marion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1998), cited in the Brief in Opposition at 24. That decision confounds the analysis of this issue by treating the question as one of "imput[ing] the discriminatory motive of the biased subordinate, as opposed to the motives of the ignorant decisionmaker, to the company." *Id.* at 547. The *Willis* court goes on to state that "[t]his court has not yet had an occasion to set in any definitive way the outer contours" of what the decision characterizes as an "exception" to the general rule that "de facto authority [should not be] allowed to trump de jure authority." *Id.*

Respectfully submitted,

JEREMIAH A. COLLINS *
LEON DAYAN
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

LISA S. VAN AMBURG
VAN AMBURG, CHACKES,
CARLSON & SPRITZER
8420 Delmar Boulevard
St. Louis, Missouri 63124

* Counsel of Record